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IN THE

# Supreme Court of the United States

October Term, 1973

No. 73-1075

MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC.,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.**

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IN THE

# Supreme Court of the United States

October Term, 1973
No. .....

MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC.,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.**

The petitioner, Michael G. Thevis, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on September 12, 1973.

## Opinions Below.

The opinion of the Court of Appeals is reported in 484 F.2d 1149, and appears in Appendix A hereto. The opinion of the District Court is reported in 329 F.Supp.265, and appears in Appendix B hereto.

## Jurisdiction.

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 12, 1973. Due and timely petitions for rehearing and petitions for rehearing

en banc, filed respectively by petitioner and by the Government, were denied by the Court of Appeals by Order entered on November 15, 1973. A copy of the said Order appears as Appendix C hereto. By Order of Mr. Justice Powell, dated December 14, 1973, the time for filing a petition for writ of certiorari in the above entitled case was extended to and including January 10, 1974. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

**Questions Presented.**

1. Whether the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction of petitioner herein, was unconstitutionally vague, violating the First and Fifth Amendments, because:

(a) the statute concededly does not contain a description of the specific sexual conduct *Miller* held was constitutionally mandated, and prior to June 21, 1973 the statute had not received an authoritative construction reading the necessary terminology into the statute;

(b) prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications offend national standards, which nationwide standards this Court found were unascertainable, unprovable and nonexistent;

(c) prior to June 21, 1973, the statute had been authoritatively construed as requiring proof that charged publications were "utterly without redeeming social value," a test this Court found "unworkable" and "ambiguous;"

(d) prior to June 21, 1973, the statute was so "vague, ambiguous and essentially meaningless" that this Court was compelled to act as an unreviewable board of censorship "subjectively judging each piece of material" charged with being obscene under Section 1462.

2. Whether the indictment in statutory language is fatally defective because it failed to inform petitioner of the nature and cause of the indictment against him, in violation of the applicable provisions of the Sixth Amendment.

3. Whether the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction of petitioner herein, under a standard for judging *scienter* solely by alleged proof of knowledge of the "contents" of the publications involved, and without competent evidence to establish that petitioner knew the contents of the said publications, abridge the freedoms of speech and press and arbitrarily deprive petitioner of his liberty and property without due process of law, in violation of the First and Fifth Amendments.

4. Whether the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction of petitioner herein, where the indictment, trial, and conviction of petitioner were concededly governed only by the standards for judging obscenity enunciated in *Memoirs*, and where the Government presented no evidence that the publications exceeded national commu-

nity standards or were utterly without redeeming social value, and where the undisputed record established that the publications did not exceed national community standards and had educational and other social value, violate the free speech and press and due process provisions of the First and Fifth Amendments.

5. Whether the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction of petitioner herein, where the publications named in the indictment are not obscene and are entitled to constitutional protection as a matter of law, violate the free speech and press and due process provisions of the First and Fifth Amendments.

6. Whether the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction of petitioner herein, where the publications, although constitutionally protected in fact and in law under the *Memoirs* test, were nevertheless held obscene under both the *Memoirs* and *Miller* tests by the Court of Appeals, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioner of his liberty without due process of law and constitute an *ex post facto* and retroactive unforeseen judicial construction of the provisions of the statute, all in violation of the provisions of the First and Fifth Amendments and Article I, Section 9.

**Constitutional and Statutory Provisions Involved.**

The pertinent provisions of the First, Fifth and Sixth Amendments, and Article I, §9 of the Constitution, and the pertinent provisions of 18 U.S.C. Section 1462 appear in Appendix D hereto.

**Statement.**

1. The twelve-count indictment herein, returned in the United States District Court for the Middle District of Florida on May 14, 1970, charged the petitioner, Michael G. Thevis, and a corporation, Peachtree News Company, Inc., with violations of Title 18 United States Code, Section 1462. The trial under the indictment was conducted before the Honorable Joe J. Fisher, United States District Judge, a jury trial having been waived. On June 25, 1971, the District Court rendered a Memorandum Opinion and Order (Appendix B), adjudging petitioner and the corporate co-defendant guilty of the charges contained in each of the counts of the indictment. The petitioner, Thevis, was sentenced to imprisonment for a period of five years as to each of the counts, to run concurrently, on condition that petitioner be confined in a jail-type institution for a period of six months, the execution of the remainder of the sentence suspended and petitioner placed on active probation for five years. The petitioner was also fined the sum of $5,000 as to each of the 12 counts, but petitioner was only required to pay $1,000 as to each of the counts, or an aggregate sum of $12,000, the remaining balance being suspended. [R.T. 760-761.][1] Petitioner was enlarged on $10,000 bail pending appeal.

2. Prior to trial, a motion to dismiss the indictment was made on behalf of the petitioner. [R.T. 24-33, 51-150.] Among other things, the petitioner alleged that the provisions of 18 U.S.C. Section 1462, on their face and as construed and applied, violated the provisions

[1]The reference "R.T." is to the two-volume Appendix filed by petitioner in the Court of Appeals below.

of the First and Fifth Amendments because the said provisions were vague and overbroad and failed to provide adequate safeguards and standards for the protection of material ordinarily entitled to the guarantees of the First Amendment. It was further urged that the provisions of the law, on their face and as construed and applied, failed to require or charge knowledge on the part of petitioner of the alleged obscene character and alleged obscene contents of the material. It was also alleged in the motion to dismiss that the publications charged in the indictment against petitioner were not obscene as a matter of law under the Constitution. The motion was denied. There were also motions for new trial [R.T. 764-988], and in arrest of judgment [R.T. 989-1,015] which raised, among other things, the same constitutional issues. The motions were denied.

3. With respect to the issue of obscenity, at the trial the Government offered only one witness, Blaine Edmund McLaughlin, a physician and psychiatrist [R.T. 368], who testified solely on the alleged prurient interest of the publications. The petitioner offered as expert witnesses John William Money, Associate Professor of Medical Psychology at Johns Hopkins University, School of Medicine, with extended expertise in the areas of sex education and sexual behavior [R.T. 608-653], and Franklin Calhoun, a clinical psychologist. [R.T. 682-714.] The Government offered no evidence to establish that the publications exceeded national community standards in the depiction or representation of

sex, or that the said publications were utterly without redeeming social value. The petitioner's expert witnesses testified that the publications did not appeal to the prurient interest of the average person or any member of a deviate group, and that the publications did have educational and other social value.

4. The opinion rendered by the District Court [Appendix B] makes clear that the publications herein are not "hard-core pornography". The District Judge emphasized that the case was being decided under *Roth* and *Memoirs* and quoted the tripartite standards enunciated by this court for judging obscenity. It was conceded by the District Judge that "the evidence in our case does not involve obtrusive dissemination or an environment in which the material is likely to fall into the hands of juveniles, and the magazines in question were not pandered."

5. The Court of Appeals held, among other things, that the motion to dismiss the indictment was properly denied; that the indictment did not have to specify the elements of obscenity; and that in following the general language of the statute, the indictment did not omit any essential elements of the offense for which petitioner had been convicted. On the issue of *scienter*, the court held that proof of knowledge or notice of the contents of the material is sufficient. The court also held that the failure of the Government to prove by competent evidence that the material here involved exceeded contemporary community standards or was ut-

terly without redeeming social value did not vitiate the judgment of conviction.

The court further declared, in the light of *Miller*, that the "utterly without redeeming social value" test and the national community standards test were no longer governing. The court recognized that the statute was required to define specific sexual conduct, but held that the statutory requirement could be satisfied by a judicial gloss. The court held that the *Miller* quintet did not preclude application of the *Memoirs* standard to material involved in transactions occurring in 1970. However, to assure that no one is convicted under standards allegedly more restrictive than those in *Miller*, the court decided that it would employ both the *Miller* and *Memoirs* definitions of obscenity. On this basis, the court concluded that all of the magazines were obscene under *Miller*, but that six were protected by the *Memoirs* requirement because they were not "utterly without redeeming social value". Thus, the judgment of conviction as to six counts was reversed, and affirmed as to the other six counts.

As heretofore stated, both petitioner and the Government petitioned for rehearing and for rehearing en banc. The Government, in its petition, maintained that only the standards enunciated in *Miller* should be applied to the material charged in the indictment. The Government argued that the test enunciated in *Memoirs* was not a constitutional standard and that the replacement of that standard by *Miller* did not violate the *ex post facto* clause of the Constitution. The said petitions for rehearing were denied by the Court of Appeals. (Appendix C.)

## REASONS FOR GRANTING THE WRIT.

1. The judgment against the petitioner herein is in direct conflict with cases decided subsequently thereto in the Ninth and Tenth Circuits. *United States v. Henson,* unreported, (9 Cir., No. 73-2063, October 5, 1973);[2] *United States v. Friedman and Peachtree Distributors, Inc.,* unreported, (10 Cir., No. 72-1143-1144, December 11, 1973).[3] In *Henson,* as in the case at bar, a judgment of conviction was rendered by utilizing the *Roth-Memoirs* test. In vacating the judgment of conviction, the court said:

> "In instructing the jury in respect to the question of obscenity, the trial judge generally and properly enunciated the tests as they were to be found in controlling Supreme Court authorities existing at the time, principally, *Roth v. United States,* 354 U.S. 476 (1957), and *Memoirs v. Massachusetts,* 383 U.S. 413 (1966). Thereafter, on June 21, 1973, and after the entry of the judgments of conviction here challenged, the Supreme Court issued a series of opinions in which its prior definitions of obscenity were in part re-

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[2]A copy of the *Henson* Opinion is attached hereto as Appendix E. The Government, in seeking rehearing, with a suggestion for a rehearing en banc, stated: "The opinion of the panel . . . must be read as holding that the obscenity test used at trial was repudiated by the Supreme Court in *Miller v. California* as unconstitutionally vague." (Govt. Pet. for Rehearing in *Henson,* 11). On December 3, 1973, the court made an order in *Henson,* deferring action on the Government's petition for rehearing with suggestion for rehearing en banc, "pending the court's disposition of a number of cases now pending before the full court en banc, the disposition of which may affect the court's opinion in the subject case."

[3]A copy of the *per curiam* opinion in *Friedman* is attached hereto as Appendix E.

> pudiated and in which *some elements of the previously existing tests applied by the District Court in this case were generally characterized as vague, ambiguous, or essentially meaningless.*" (Emphasis added.)

After vacating the judgment of conviction, the court remanded the case to the district court for reconsideration in light of this Court's decisions of June 21, 1973, and in light of *Stroud v. State,* 300 N.E.2d 100 (August 21, 1973), and *Mohney v. State,* 300 N.E.2d 66 (August 21, 1973), wherein the Indiana Supreme Court declared that State's obscenity statute unconstitutionally vague in light of this Court's June 21, 1973 decisions.

In *United States v. Friedman, et al., supra,* the court vacated an obscenity conviction and remanded to the district court for a new trial. The court stated that it was its view

> "that the several recent [obscenity] decisions of the Supreme Court require a reconsideration of the standards applicable to cases of this nature. . . . These decisions . . . require a re-examination of the facts of this case together with the determination of what may be the applicable standards. . . . A consideration of the application of national or local standards should be initially made by the trial court in addition to the determination of what such standards may be."

2. In light of the Court's rulings on June 21, 1973, the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction against petitioner herein, were unconstitutionally vague. Petitioner has

been denied due process, in its primary sense, having been convicted of violating a statute which failed to provide him with adequate notice of the conduct proscribed by Section 1462.

Section 1462, on its face and as construed and applied to petitioner, is unconstitutionally vague, because:

(a) the statute concededly does not contain a description of the specific sexual conduct *Miller* held was constitutionally mandated, and prior to June 21, 1973 the statute had not received an authoritative construction reading the necessary terminology into the statute;

(b) prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications offend national standards, which nationwide standards this Court found were unascertainable, unprovable and non-existent;

(c) prior to June 21, 1973, the statute had been authoritatively construed as requiring proof that charged publications were "utterly without redeeming social value," a test this Court found "unworkable" and "ambiguous;"

(d) prior to June 21, 1973, the statute was so "vague, ambiguous and essentially meaningless" that this Court was compelled to act as an unreviewable board of censorship "subjectively judging each piece of material" charged with being obscene under Section 1462.

*A.* Prior to June 21, 1973, Section 1462 was unconstitutionally vague, because it failed to contain a description of the sexual conduct *Miller* held was constitutionally mandated and the statute had not re-

ceived a prior authoritative construction reading the necessary terminology into the statute. In *Miller* (93 S.Ct. at 2614-2615), the Court stated:

> ". . . State statutes designed to regulate obscene materials must be *carefully limited.* See *Interstate Circuit, Inc. v. Dallas, supra,* 390 U.S. at 682-685 (1968). As a result, we now *confine* the permissible scope of such regulation to works which depict or describe sexual conduct. That *conduct must be specifically defined by the applicable state law, as written or authoritatively construed.*" (Emphasis added.)

Subsequently, the Court said (93 S.Ct. at 2616):

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. . . ."

The court below recognized that the statute under which petitioner was convicted utilized vague standards, saying: "On its face, this statutory terminology ['obscene, lewd, lascivious or filthy'] does not contain the specifics required by *Miller.* . . . *Miller* requires that elements of the definition be a part of the statute." *United States v. Thevis, Peachtree News Co., Inc.,* 484 F.2d at 1155. The court below concluded however that the statute's deficiency could be saved by an authoritative *retroactive* judicial construction. Thus, the court said: ". . . [I]n *12 200-Ft. Reels, supra,* at fn. 7, the Court states that it is 'prepared to construe such [federal statutory] terms as limiting regulated material to patently offensive representations or descriptions of

that specific "hard-core" sexual conduct given as examples in *Miller*. . . .' We believe that this answers the question and that the definition of *Miller* is a gloss properly added to §1462. . . ." (484 F.2d at 1155.)

The lower court's reliance on *12 Reels of Film*, is, it is respectfully submitted, misplaced. When this Court stated that it was *prepared* to construe the vague terms "obscene, lewd, lascivious, filthy" in accordance with *Miller*, the Court made clear that prior to June 21, 1973, there had been no such authoritative construction. In *Louisiana v. Shreveport News Agency, Inc.*, .... La. S.Ct. .... (Supreme Court of Louisiana, No. 53-954, Dec. 3, 1973), the court refused to read *Miller* into the Louisiana obscenity statute retroactively. The Louisiana obscenity statute, like Section 1462, used the general terms "obscene, lewd, lascivious", etc. In concluding that the Louisiana state obscenity statute was unconstitutional because it did not contain a description of the specific sexual conduct an obscenity statute must contain if it is to meet constitutional requirements, Justice Barham, speaking for the court, said:

> ". . . [I]t must be obvious even to laymen and surely to this Court, that [the Louisiana obscenity statute] does not meet the guidelines and standards set forth by the United States Supreme Court in Miller v. California.
>
> "We are urged by the State, however, to take the two examples, which the Miller majority opinion suggests state legislatures might define for regulation of certain obscene materials, and to make them the obscenity statute for Louisiana. . . .
>
> "In United States v. 12 200 Ft. Reels of Super 8 mm. Film . . . the Chief Justice . . . stated in

> Footnote 7, in pure obiter dictum, that the Supreme Court was prepared to construe 'obscene', 'lewd', 'lascivious', 'filthy', 'indecent', or 'immoral', for the purpose of reviewing the constitutionality of the federal statutes . . . as being limited to 'specific-hard-core' sexual conduct given as examples in Miller v. California. We are bound by the holdings of the United States Supreme Court. We are not bound by the passing remarks of the authors of the opinions from that Court. We are not of the opinion that we are endowed with the constitutional authority to re-draft Louisiana's obscenity statute. . . ." (Slip Opinion, 7-8.)

Even if the language in *12 Reels of Film* is more than pure *obiter dictum,* it certainly did not purport to have any retroactive effect. This Court has consistently held that the Judiciary is barred by the Due Process Clause from attempting to cure a vague statute by retroactive rulings, "either of the trial court or of the appellate court". The fundamental principle which requires a criminal offense to have existed when the conduct in issue occurred applies to bar "retroactive criminal prohibitions emanating from courts as well as from legislatures". *Bouie v. Columbia,* 378 U.S.347, 353, 354. See, also, *Douglas v. Bouder,* 93 S.Ct.2199.

*B.* Prior to June 21, 1973, Section 1462 was unconstitutionally vague, because the statute was authoritatively construed as requiring proof that charged publications offend national standards, which nationwide standards this Court found were unascertainable, unprovable and non-existent.

In *Miller,* the Court held that in a *state* obscenity prosecution, a *statewide standard* was sufficient to meet

constitutional requirements, and a national standard need not be applied. But in a federal obscenity case a national standard must be used, both because Congress so intended and because the Constitution probably requires it. See, *Manual Enterprises, Inc. v. Day*, 370 U.S.478, 488.[4]

In *Miller*, Chief Justice Burger made it crystal clear that the federal and state standards were quite different by citing Justice Harlan's opinions in which he repeatedly argued for tight federal obscenity laws and looser state laws. (93 S.Ct. at 2620.)

This distinction was initially articulated by Mr. Justice Harlan dissenting in *Roth* and concurring in *Alberts*, 354 U.S. at 503-508. Justice Harlan there stated:

> ". . . [T]he interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric."

---

[4]The Court on June 21, 1973 was mute on the question of whether nationwide standards are still required in federal obscenity prosecutions. In *United States v. Orito* (93 S.Ct. at 2679), the Court incorporated the portion of *Miller* appearing in 93 S.Ct. at 2614-2615, and in *United States v. 12 Reels of Film* (93 S.Ct. at 2670, n. 7), the Court incorporated the portion of *Miller* appearing in 93 S.Ct. at 2615-2616. These page references relate solely to the kind of sexual conduct which might be reached under a valid obscenity statute. The discussion of local vs. national standards occurs at 93 S.Ct. at 2618-2620, where the Court said that state standards were constitutionally sufficient in a state prosecution.

Justice Harlan went on to state that not only is the federal interest in protecting the Nation against pornography attenuated, "but the dangers of federal censorship in this field are far greater than anything the States may do." Justice Harlan stated that he would judge a federal obscenity case against the background of "the attenuated federal interest in this field" and in view of the "very real danger of a deadening uniformity which can result from nationwide federal censorship."

Mr. Justice Harlan announced the opinion of the Court in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 487, wherein he observed that *"Roth's* evident purpose [was] to tighten obscenity standards". In discussing the relevant "community" in terms of whose standards of decency the issue of obscenity must be judged, Justice Harlan said: "We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency. We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue which would not have the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency." (370 U.S. at 488). In a footnote at the same page, Justice Harlan stated: "The 1958 amendments to 18 U.S.C. § 1461, 72 Stat. 962, 18 U.S.C.A. §1461, authorizing criminal prosecution at the place of delivery evince no purpose to make the standard less than national." See the testimony of Justice Rehnquist when he was Assistant Attorney General, Office of Legal Coun-

sel, Department of Justice, at *Hearings Before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, Ninety-First Congress, on H.R. 5171, H.R. 11009, H.R. 11031, H.R. 11032, and related measures, Serial No. 21* (pp. 37-38, 46-47), where Justice Rehnquist expressed the view that a federal obscenity statute *had* to utilize national standards.

Mr. Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton*, 93 S.Ct.2628, 2646, n. 7, addressed himself to the different standards applicable in state and federal cases, saying:

> "On the question of community standards see also *Hoyt v. Minnesota*, 399 U.S.524 . . . (Blackmun, J., joined by Burger, C.J., and Harlan, J., dissenting (flexibility for state standards); *Cain v. Kentucky*, 397 U.S.319 . . . (Burger, C.J., dissenting) (same); *Manual Enterprises v. Day*, 370 U.S.478 . . . (Harlan, J., joined by Stewart, J.) (national standards in context of federal prosecution)."

Once it is recognized that 18 U.S.C. Section 1462, as applied to petitioner herein, utilized a nationwide test, it becomes clear that the statute so applied is unconstitutionally vague. In *Miller*, the Court observed that our Nation is too big and too diverse for the Court to be able to articulate "a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient', it would be unrealistic to require that the answer be based on some abstract formulation." (93 S.Ct. at 2618). To structure an obscenity prosecution around evidence of na-

tional community standards "would be an exercise in futility" (93 S.Ct. at 2618). The Court found nothing in the First Amendment that requires a jury to consider "*unascertainable* 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact." (93 S.Ct. at 2619) (emphasis added). In *Miller*, the Court cited with approval Chief Justice Warren's observation in *Jacobellis v. Ohio*, 378 U.S. 184, 200, "that there is no provable 'national standard' . . . . [I]n all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

Where, as here, 18 U.S.C. Section 1462 was construed and applied to make it a felony to transport in interstate commerce publications which allegedly were offensive to unascertainable and unprovable national standards, the statute is plainly impermissibly vague.[5]

*C.* Prior to June 21, 1973, Section 1462 was unconstitutionally vague, because it utilized an unworkable and ambiguous test—the "utterly without redeeming social value" test.

The court below stated that *Miller* did not "indicate" that *Memoirs* was unconstitutionally vague, but rather that the Court was dissatisfied with *Memoirs* "because it imposed greater burdens on the regulation of such

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[5]In *Miller*, 93 S.Ct. at 2614, the Court cited with approval *Interstate Circuit v. Dallas*, 390 U.S.676, where an obscenity ordinance was declared unconstitutionally vague. Chief Justice Burger's specific reference to *Interstate Circuit* was to 390 U.S. at 682-685, where the Court stated that because First Amendment rights were at stake "precision of regulation must be the touchstone". See also, *Grayned v. City of Rockford*, 408 U.S.104, 108-109; *Gooding v. Wilson*, 405 U.S.518; *Papachristou v. City of Jacksonville*, 405 U.S.156; *Ashton v. Kentucky*, 384 U.S.195; *Giaccio v. Pennsylvania*, 382 U.S.399; *Winters v. New York*, 333 U.S.507.

materials than was demanded by the Constitution" (484 F.2d at 1154). With all respect, petitioner suggests *Miller* did "indicate" that *Memoirs* was unconstitutionally vague. *Memoirs* was rejected precisely because of its unworkability—its vagueness. Chief Justice Burger spoke of the "intractable obscenity problem" (*Miller*, 93 S.Ct. at 2610). Quoting Justice Harlan, the Court wondered if the " 'utterly without redeeming social value' test had any meaning at all" (93 S.Ct. at 2613). The Court pointed to the "variety of views among the members of the Court unmatched in any other course of constitutional adjudication" (93 S.Ct. at 2614). The *Memoirs* test, the Court said, has been abandoned as unworkable by its author and no member of the Court today supports the *Memoirs* formulation" (93 S.Ct. at 2614).

The court below asserted that the *Memoirs* test was not unconstitutionally vague because *Miller* stated that *Memoirs* was "correctly regarded at the time of trial as limiting state prosecution under controlling case law". (484 F.2d at 1154). What Chief Justice Burger had in fact stated in that regard was that *"a 'national' standard of First Amendment protection* enumerated by a plurality of this Court was correctly regarded at the time of trial as limiting state prosecution under controlling case law" (93 S.Ct. at 2618) (emphasis added). In stating that a national standard was required prior to June 21, 1973, the Chief Justice was not saying that the national standard test was sufficiently specific to meet the requirements of due process. On the contrary, Chief Justice Burger stated that there was no ascertainable national standard. A standard that is not ascertainable is plainly vague and, hence, unconstitutional.

*D.* Prior to June 21, 1973, Section 1462 was so vague, ambiguous and unworkable that this Court was required to adopt the *Redrup* approach of deciding each case on an *ad hoc* basis, without attempting to offer guidance to those subject to the provisions of the statute.

In *Miller,* Chief Justice Burger said that in view of the unworkability of the *Roth-Memoirs* test "this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup v. New York,* 386 U.S.767 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup 'policy'. See Walker v. Ohio,* 398 U.S. 434, 434-435 (dissenting opinions) (1970). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." (93 S.Ct. at 2614, n.3).

Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton,* 93 S.Ct. at 2647, made the same point, saying: "In the face of this divergence of opinion the Court began the practice in 1967 in *Redrup v. New York,* 386 U.S.767, of *per curiam* reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene." After stating that the Court had failed to formulate a satisfactory standard for separating protected from unprotected speech, Justice Brennan went on to say that out of necessity the Court "resorted to the *Redrup* approach, which resolves cases

as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decision. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion." (93 S.Ct. at 2647).

Our Constitution, of course, requires fair notice so that the law-abiding can conform their conduct to the requirements of the law. But how was the petitioner, a law-abiding citizen, to know what publications dealing with sex would be found obscene by five of the Justices "subjectively judging" the publications "applying their separate tests"? If judges, attempting to follow this Court's lead conscientiously, "have often ended in hopeless confusion", was not petitioner's plight even more hopeless?

In *Grayned v. City of Rockford,* 408 U.S.104, 108-109, this Court said: "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."

In the case at bar, petitioner, a law-abiding citizen, and an innocent man, has been trapped by being convicted under a statute which no man, not even the most learned Justice, can understand.

3. In light of this Court's decisions of June 21, 1973, the Indictment herein is fatally defective, be-

cause it failed to inform petitioner of the nature and cause of the accusation against him, in violation of the Sixth Amendment.

In *United States v. Orito,* 93 S.Ct.2674, 2679, this Court vacated the judgment of the district court and remanded the case "for reconsideration of the *sufficiency of the indictment* in light of *Miller v. California, supra; United States v. Twelve 200-Ft. Reels supra,* and this opinion." (Emphasis added.)

The necessity of examining the sufficiency of the indictment herein flows naturally from this Court's recognition that neither the words of the statute alone ("obscene, lewd, lascivious, filthy") nor the gloss put on these words by *Roth-Memoirs* gave sufficient notice of the offense charged. In the case at bar, the sole charge in the Indictment is that petitioner transported in interstate commerce by common carier "obscene, lewd, lascivious or filthy" publications. Petitioner duly moved to dismiss the Indictment because "it merely tracked the statutory language without specifying the elements constituting 'obscenity' ". *United States v. Thevis,* 484 F. 2d at 1151, 1152. The court below rejected petitioner's contention, invoking the general rule that: "An indictment which follows the language of the statute is ordinarily sufficient unless the statute omits an essential element of the offense. . . . The statute here does not omit any essential element of the offense for which [petitioners] have been convicted. The term 'obscene' as used in the statute is a legal term of art, not merely a generic or descriptive term. The term has been the subject of much explication in Supreme Court opinions, and in particular has been defined in *Roth* and *Memoirs.*" (484 F.2d at 1152). The court below recognized that *Miller* "requires that regulatory statutes

define specific sexual conduct to whose depiction or description they apply" (484 F.2d at 1154), and that, on its face, the statutory terminology of §1462 "does not contain the specifics required by *Miller*" (484 F.2d at 1155). Nevertheless, the court concluded that the statutory deficiencies "can be satisfied by a judicial gloss" (484 F.2d at 1154, 1155) and that this subsequently imposed judicial gloss could appropriately be read into the Indictment retroactively.

Petitioner has no quarrel with the rule that an indictment which follows the language of a statute is *ordinarily* sufficient, unless the statute omits an essential element of the offense. It is petitioner's contention that Section 1462, standing alone, does omit an essential element of the offense and, therefore, the Indictment, which merely repeats the language of the defective statute, is insufficient. The court below concluded that this Court's definition of "obscenity" rendered in *Roth* and *Memoirs* had given the statutory language of Section 1462 such a clear and precise meaning that the term "obscene" was a "legal term of art" without ambiguity (484 F.2d at 1152). Nothing could be further from the truth.

In the decisions of June 21, 1973, the Court was unanimous on one point, and one point only—that the *Roth-Memoirs* test had failed to give adequate guidance as to what publications were criminal and what publications were unconditionally protected by the free speech and press provisions of the First Amendment. The *Roth-Memoirs* test was rejected as unworkable and unsupported by any member of the Court. The confusion surrounding this "legal term of art" was explored by the Fifth Circuit in *United States v. Groner*, both by the

panel (475 F.2d 550 [5 Cir. 1972]) and by the court en banc (479 F.2d 577 [5 Cir. 1973]). Judge Clark commented on the Court's failure to give "the respective limits of 'free press' rights under the First Amendment and unprotected publications which exploit sexuality," stating that "the judiciary has created a quagmire" (475 F.2d at 559). Judge Gewin, speaking for the majority of the en banc court, stated that the familiar *Roth-Memoirs* test "represents an amalgam of the individual views of members and former members of the Supreme Court, taken from their respective concurring or dissenting opinions in *Roth* and subsequent decisions involving obscenity." (479 F.2d at 580). He concluded that the *Roth-Memoirs* test "is not the prevailing test" (479 F.2d at 580). In overruling the panel's decision in *Groner*, Judge Gewin stated: "[I]t is apparent that the panel opinion was decided on an erroneous view of the test to be applied in determining obscenity. Neither the 'patent offensive' nor the 'utterly without redeeming social value' elements are included in the test laid down by the Supreme Court, nor is the community national in scope." (479 F.2d at 583). Judge Ainsworth (joined by Judges Gewin, Bell, Coleman, Dyer, Clark, Ingraham and Ronney) recognized that "accurate guidelines . . . based on past decisions of the Supreme Court, are hard to find." (479 F.2d at 586).

In light of the Fifth Circuit's observation that "the judiciary has created a quagmire," and that *Roth-Memoirs*, pursuant to which petitioner was convicted, was "not the prevailing test," it is difficult for petitioner to understand what the court below meant when it stated that the term "obscene" is a "legal term of art", unless that court was thinking of abstract art. It is also difficult for petitioner to harmonize the statement

of the court below that Section 1462 "does not omit any essential element of the offense" (484 F.2d at 1152) with the court's recognition that on its face the statutory terminology of Section 1462 "does not contain the specifics required by *Miller* and that "*Miller* requires that elements of the definition be a part of the statute" (484 F.2d at 1155).

*Russell v. United States,* 369 U.S.749, is the leading case dealing with the sufficiency of an indictment in a federal prosecution. *Russell* holds that in an indictment upon a statute, *it is not sufficient to set forth the offense in the words of the statute,* unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. (369 U.S. at 765-766.) See also, *United States v. Carll,* 105 U.S.611, 612. In light of the tortured and unsuccessful efforts of this Court and other courts to define "obscene, lewd, lascivious and filthy", it must be conceded by all that those words, standing alone, fail to set forth "all the elements necessary to constitute the offense" intended to be punished by §1462. In *Russell,* the Court explored the purpose served by a grand jury indictment in the administration of federal criminal law, concluding that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation", and that "the constitutional provision that a trial may be held in a serious federal criminal case only if a grand jury had first intervened reflects centuries of antecedent development of common law" (369 U.S. at 761).

Where, as here, guilt or innocence depends so crucially upon the meaning given to the words "obscene,

lewd, lascivious or filthy", the Indictment must do more than simply repeat the vague language of that criminal statute. "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars. . . . An indictment not framed to apprise the defendant with reasonable certainty of the nature of the accusation made against him . . . is defective, although it may follow the language of the statute." (369 U.S. at 765.) The Court noted that "these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure. . . ." (369 U.S. at 765-766.) Where, as in the case at bar, the statutory language does not encompass all the elements of the offense, an indictment which merely repeats the statutory language requires the accused "to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of his conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion . . . to condemn such a practice in a quite different factual setting. Cole v. Arkansas, 333 U.S.196, 201, 202." (369 U.S. at 766.)

This principle has special application to obscenity prosecutions, where uncertainty as to the meaning of the term "obscene" has characteristically infected criminal proceedings under Section 1462. As the Court said

in *Russell:* "Difficult and doubtful questions are inherent in the judicial process, particularly under a system of criminal law which places heavy emphasis upon the protection of the rights and the liberties of the individual. . . . [A] proliferation of doubtful issues which not only burden the judiciary, but, because of uncertainties inherent in their resolution, work a hardship upon both the prosecution and the defense in criminal cases, is hardly a desideratum. . . . [T]he repeated appearance in prosecutions under a particular criminal statute of the same critical and difficult question, which could be obviated by a simple averment in the indictment, invites inquiry into the purposes and functions which a grand jury indictment is intended to serve." (369 U.S. at 760.)

In *Russell,* the Court stated that at every stage in the criminal proceeding the accused "was met with a different theory, or by no theory at all. . . . Far from informing [him] of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." (369 U.S. at 769), and spoke of the difficulties and uncertainties which the federal trial and reviewing courts had in dealing with cases arising under the statute there involved. "Viewed in this context", the Court said the rule that an indictment must contain more than mere statutory language "is designed not alone for the protection of the defendant, but for the benefit of the prosecution as well, by making it possible for courts called upon to pass on the validity of convictions under the statute to bring an enlightened judgment to that task." (369 U.S. at 769.) Federal trial

courts and reviewing courts have had even greater difficulties and uncertainties in dealing with cases arising under Section 1462.

In the case at bar, we have no clarifying bill of particulars. In any event, *Russell* teaches us that a bill of particulars cannot save an invalid indictment.

> "To allow the prosecutor, or the Court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." (369 U.S. at 770.)

In *United States v. Vuitch*, 402 U.S.62, the trial court dismissed an indictment charging the commission of an abortion, on the ground that the statute was unconstitutionally vague. This Court reversed, concluding that the statute, properly construed, was not unconstitutionally vague. The Court stated however, that under the statute "the burden is on the prosecution to *plead and prove* that an abortion was not 'necessary for the preservation of the mother's life or health' ". (402 U.S. at 71.) (Emphasis added.)

In *Rabe v. Washington*, 405 U.S.313, the Court held that a state obscenity statute, construed as prohibiting the showing of a sexually oriented movie in a drive-in theatre, which movie might be exhibited to adults in an indoor theatre with impunity, was impermissibly vague for failure to give the accused fair notice that criminal liability was dependent upon the place where

the film was shown. Chief Justice Burger, joined by Justice Rehnquist, concurred, saying:

> ". . . That this record shows an offensive nuisance that could properly be prohibited, I have no doubt, but *the* state statute and *charge did not give the notice constitutionally required.*" (405 U.S. at 317.) (Emphasis added.)

Circuit and district courts have uniformly invalidated indictments containing ambiguities less gross than those found in the case at bar. See, *United States v. Leonard,* 455 F.2d 949, 950 (9 Cir. 1972); *United States v. Fiorito,* 465 F.2d 431, 432 (7 Cir. 1972); *Nelson v. United States,* 406 F.2d 1136 (10 Cir. 1969); *United States v. Beard,* 414 F.2d 1014 (3 Cir. 1969); *United States v. Little,* 317 F.Supp.1308 (D.C. Del. 1970); *United States v. Farinas,* 299 F.Supp.852 (D.C. N.Y. 1969); *United States v. Schneiderman,* 102 F.Supp.87 (D.C. Cal. 1951).

The central fact that emerges from the June 21, 1973 decisions is that the statutory language of Section 1462, and the gloss put on that language by *Roth-Memoirs,* failed to give petitioner the constitutionally required notice. The Indictment, which merely repeated the defective statutory language was, therefore, fatally infirm.

4. The court below held that proof of knowledge or notice of the contents of alleged obscene material is sufficient to satisfy the *scienter* requirement in federal obscenity prosecutions. The issue raised by this ruling is one of substantial importance which has not been, but should be, decided by this Court.

In *Roth v. United States,* 354 U.S.476, the Court emphasized that the ambiguities of the standards for

judging obscenity could not be reconciled with the due process guarantees of fair notice without proof of guilty knowledge and specific intent. See, cases cited in *Roth*, 354 U.S. at 491-492, and repeated in *Miller v. California*, 93 S.Ct. at 2617, n. 10.

In *Smith v. California*, 361 U.S.147, the Court held that it was constitutionally impermissible to dispense entirely with the element of *scienter* in an obscenity prosecution. Justice Brennan, writing for the Court, stated:

> "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be." (361 U.S. at 154).[6]

In *Mishkin v. New York*, 383 U.S.502, the Court approved a construction of the state obscenity statute which required proof that the accused was in some

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[6]Justice Black agreed that the ordinance could not penalize a bookseller, even though he was not aware of its "obscenity" (361 U.S. at 156). Justice Frankfurter understood the Court's opinion as holding that one could not be accused of violating the obscenity law unless he was charged with "knowledge of the obscenity" (361 U.S. at 161.) See, the opinion of Justice Harlan (361 U.S. at 170) and Justice Harlan's opinion for the majority in *Manual Enterprises, Inc. v. Day*, 370 U.S.478, 492-493, and fn. 16. See also, *New York Times Co. v. Sullivan*, 376 U.S.254, 278-279.

manner aware of the "character" of the material, together with proof of "calculated purveyance" of the alleged obscene material (383 U.S. at 510). At the same time, the Court rejected a standard which would require mere proof of "knowledge of the contents of the books" (383 U.S. at 510, fn. 9). Again the Court reiterated that it was not yet prepared to define what sort of mental element was requisite to a constitutionally permissible obscenity prosecution (383 U.S. at 511), but the Court emphasized that the Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material and to compensate for "the ambiguities inherent in the definitions of obscenity" (383 U.S. at 511).[7]

In *Redrup v. New York* and *Austin v. Kentucky*, 384 U.S.916, certiorari was granted in both cases, limited solely to those questions which presented the issue of *scienter* in the petitions. In the *per curiam* decision which followed, however, the Court decided that the material involved in the cases was not "obscene", the decision being made "without prejudice to the questions upon which review was originally granted." *Redrup v. New York* [*Austin v. Kentucky*], 386 U.S.767, 770. In his dissent, Justice Harlan noted that in *Smith v. California* a defendant criminally charged "with purveying obscene material must be shown to have had some kind of knowledge of the character of such material; the quality of that knowledge, however, was not defined", and Justice Harlan expressed regret that the

[7]The indictment here did not allege petitioner's knowledge of the character of the magazines or specific intent to transport the alleged obscene publications, and the petitioner argued in the trial court, and in the court below, that this rendered the indictment constitutionally inadequate. See, *United States v. Orito*, 93 S.Ct. at 2676, n. 2.

Court had not "come to grips with such issues" (386 U.S. at 771-772).

One is not ordinarily guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. Ignorance or mistake of fact negatives the existence of a *mens rea.* Moreover, mere proof of knowledge will not be sufficient unless such knowledge is accompanied by an intent to do the acts which constitute the harm against which the law is directed. Both knowledge and intent must exist before *scienter* can be deemed proven. Knowledge is the foundation of intent; without the knowledge the intent cannot exist. *United States v. Falcone,* 311 U.S.205. The ordinary criminal law also requires, in many cases, proof of a specific intent, that is, proof of an act done with a bad purpose. See, *Screws v. United States,* 325 U.S.91; *Dennis v. United States,* 341 U.S.494, 499.

Every obscenity prosecution implicates First Amendment questions, and therefore the standards for judging *scienter* in such prosecutions require more critical analysis than exist in the ordinary criminal case. "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." *Speiser v. Randall,* 357 U.S. 513, 520. Stricter standards governing proof of *mens rea* and specific intent are required in the enforcement of statutes which affect the exercise of the freedoms of speech and press; this in order to avoid the constitutional infirmities which lurk in statutes involving First Amendment rights, and also to preserve the commu-

nity's right to know which may be seriously affected by the chilling effect and self-induced censorship engendered by laws and prosecutions thereunder which fail to provide exacting standards for judging *scienter*.

The court below, relying upon a decision of this Court rendered in 1896, held that mere proof of knowledge of "contents" of a publication was sufficient to establish the requisite *scienter* in an obscenity prosecution. The court declined to enunciate any other standard, disregarding decisions rendered by this Court in the Twentieth Century which cast a far different light on the importance of maintaining the rights guaranteed by the First Amendment against subtle erosions created by vague and ambiguous statutes and the elimination of strict *scienter* requirements. Thus the court below did not even require proof of an intent by an accused to commit a public wrong, or proof of knowledge of those operative facts which bring an obscenity statute into play, or proof of knowledge of the alleged obscenity of the material, or reckless disregard of whether or not the material was obscene. Yet such decisions of this Court as *Smith v. California*, *New York Times v. Sullivan* and the *Miller* quintet of decisions rendered on June 21, 1973, make it clear that mere proof of knowledge of the "contents" of a publication cannot be deemed the equivalent of proof of guilty knowledge under the laws and the Constitution.

To permit the conviction of an accused in an obscenity prosecution solely on the basis of purported proof that the accused knew the "contents" of the material is to impose the absolute criminal liability condemned by this Court in *Smith v. California*. Sex and obscenity are not the same, and knowledge of the

"contents" of a publication dealing with sex cannot be the equivalent of knowledge of the obscenity of the publication. Mere proof that a publisher or distributor knew the contents of the multifold books, magazines and films ultimately held to be entitled to constitutional protection by this Court and other courts plainly fails to establish that such publisher or distributor knew the material was obscene. See, for example, *Grove Press, Inc. v. Gerstein,* 378 U.S.577; *Weiner v. California,* 404 U.S.988; *Burgin v. South Carolina,* 404 U.S.806; *Hartstein v. Missouri,* 404 U.S.988.

It follows, therefore, that mere proof of "knowledge of contents" cannot be the standard for judging *scienter* since such standard alone would leave the federal obscenity statute vague, ambiguous, uncertain and overbroad, in violation of the provisions of the First Amendment. Prosecutions under such a standard would violate the due process guarantees which accompany any criminal trial. A jury or trial judge would be left free to presume guilty knowledge under the federal obscenity statute by their own subjective predilections, on the basis of arbitrary and irrational inferences and presumptions which undermine all procedural safeguards required in criminal prosecutions, particularly involving speech and press. *Bailey v. Alabama,* 219 U.S.219; *Tot v. United States,* 319 U.S.463; *Speiser v. Randall,* 357 U.S.513. Such an arbitrary standard would encourage the self-censorship and private suppression of constitutionally protected material. *Smith v. California,* 361 U.S.147; *New York Times Co. v. Sullivan,* 376 U.S.254.

If an accused may be convicted without any proof that he knew that the material was obscene, and without

any possibility of establishing in his own defense his honest ignorance that the material was obscene, then the trial of an obscenity prosecution becomes inherently unfair, and the right to confront witnesses, to present evidence in one's own behalf, and to have the assistance of counsel and a determination by an impartial jury becomes meaningless. Such a determination by a jury, based on its own subjective predilections, is no more than an *ex post facto* determination which visits upon the accused cruel and unusual punishment in the most primary sense of the terms. The notion that everyone "must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd and lascivious" has been rendered untenable by the decisions of this Court since *Roth*, through *Jacobellis, Memoirs, Ginzburg, Redrup, Stanley*, and the June 21 decisions, as well as by the changing social conditions, attitudes, and "sexual revolution" (*Miller v. California*, 93 S.Ct. at 2621) of the past decades. See, *Griswold v. Connecticut*, 381 U.S.479; *Eisenstadt v. Baird*, 405 U.S.438; *Doe v. Bolton*, 93 S.Ct.739; *Roe v. Wade*, 93 S.Ct.705; *United States v. Klaw*, 350 F.2d 155 (2 Cir. 1965); *In re Winship*, 397 U.S.358; *United States v. Vuitch*, 402 U.S.62; and *The Report of the Commission on Obscenity and Pornography*, September 1970.

It is submitted, therefore, that the judgment of conviction herein is constitutionally infirm because the standard for judging *scienter*, based solely on knowledge of the contents, does violence to the guarantees of the free speech and press and due process clauses of the First and Fifth Amendments. It should also be added that in the case herein, there was no competent evidence to establish knowledge of the contents of the

specific publications charged in the indictment on the part of the petitioner, Thevis.

5. The conduct alleged in the indictment occurred in April and May, 1970. The indictment was returned in May 1970; the trial was conducted in October and November 1970; and the finding of guilt was returned by the trial judge in June 1971. At the trial, the Government made no attempt to prove that the publications herein involved exceeded contemporary community standards in the Nation as a whole in the depiction or representation of sex, nor any attempt to prove that the material was utterly without redeeming social value or importance. The undisputed evidence establishes by competent evidence that the magazines do not offend national contemporary community standards and do have social value and importance.

The contention made by petitioner below that the Government had failed to establish beyond a reasonable doubt the essential elements of the offense charged in the indictment, and that the undisputed record made by petitioner establishes his innocence, was dismissed by the court below by the mere observation that: "Expert testimony on the part of the prosecution is not necessary in cases where the materials themselves are available for inspection by the finder of fact." Petitioner submits that the court below misconceived the issue presented and reached a constitutionally impermissible result.

The trial in the case herein was conducted under the theory that the standards for judging the alleged obscenity of the publications were those enunciated by this Court in *Memoirs v. Massachusetts,* 383 U.S. 413, 418. Thus the obligation rested upon the prosecu-

tion to prove beyond a reasonable doubt three essential elements of the offense, to wit, that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; (c) the material is utterly without redeeming social value.

As this Court noted in *Miller* (93 S.Ct. at 2618-2620), a national standard of First Amendment protection limited both federal and state prosecutions under controlling case law at the time when the trial herein was conducted. In the area of federal prosecutions, it was recognized that the plain intent of Congress in the enactment of federal obscenity statutes was the requirement that the alleged obscenity of publications be measured by a national standard. This was the view of Justice Harlan from *Roth* through *Manual Enterprises, Inc. v. Day,* 370 U.S.478, 488, n. 10, and *Memoirs,* 383 U.S. at 458. In *Miller,* the Chief Justice, writing for the majority, noted the past opinions of Justice Harlan and the concurring views of Justice Blackmun on this issue. Moreover, under *Memoirs,* the prosecution, in order to prove obscenity, was required to affirmatively establish that the material was "utterly without redeeming social value." *Miller v. California,* 93 S.Ct. at 2613.

As heretofore stated, the Government made no attempt to prove the aforesaid essential elements of the offense. See, *In re Winship,* 397 U.S.358; and *Memoirs v. Massachusetts,* 383 U.S.413. Nevertheless, the petitioner here was convicted on the theory that the publications herein involved exceeded national standards and

were utterly without redeeming social value. This Court, however, described the national standard test as "unrealistic" and "an exercise in futility". The national standard was termed "hypothetical" and "unascertainable"; a standard which was not "provable", and "neither realistic nor constitutionally sound". 93 S.Ct. at 2618-2620. With respect to the "utterly without redeeming social value" test, this Court described the test as imposing a "burden virtually impossible to discharge under our criminal standards of proof". 93 S.Ct. at 2613.

In short, the petitioner here was convicted without proof of the essential elements of the offense and under standards which this Court has held are unconstitutional and virtually impossible to establish. To convict an accused without proof of guilt and under palpably unconstitutional and unlawful standards is to deprive the accused arbitrarily and capriciously of his liberty without the slightest semblance of due process of law. *Thompson v. City of Louisville,* 362 U.S.199; *Tot v. United States,* 319 U.S.463; *DeJonge v. Oregon,* 299 U.S. 353; *Cole v. Arkansas,* 333 U.S.196; *Rabe v. Washington,* 405 U.S.313; *In re Winship,* 397 U.S.358.

6. The publications here were entitled to constitutional protection when the alleged offenses occurred and at the time the judgment of conviction was rendered. The publications were entitled to constitutional protection under the prior decisions of this Court and, indeed, the decisions of this Court rendered on June 21, 1973 support this conclusion. As the decision of the trial judge makes clear, the Government never contended that the material here could be described as "hard core pornography" and the trial judge made no such finding. The trial judge also made it clear in his

opinion that no issue of pandering or distribution to juveniles, or offense to public sensibilities, was at all involved in the case herein. The publications herein are less candid than those that were held entitled to constitutional protection in such cases as *Wiener v. California,* 404 U.S.988; *Burgin v. South Carolina,* 404 U.S.806; and *Hartstein v. Missouri,* 404 U.S.988.

As heretofore discussed, if under the *Memoirs* standards, "this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment." (93 S.Ct. at 2614, n. 3), then it is respectfully submitted the petitioner could not be fairly charged with knowing that the publications herein were without constitutional protection in the light of the multifold rulings made by the Court with respect to comparable material.

The publications herein involved, on the undisputed record and under the governing controlling law, were not obscene and were entitled to constitutional protection.

7. The court below concluded that six of the publications herein offended both the *Memoirs* and *Miller* standards (June 21, 1973), and adjudged that the convictions on the counts of the indictment relative to such publications could be upheld. Such ruling offends not only the free speech and press and due process guarantees of the constitution, but the principles of fair notice and protection of an accused from retroactive application of unforeseeable judicial statutory construction.

Insofar as the *Memoirs* standards are concerned, as hereinbefore discussed, none of the publications are ob-

scene. None of the publications contain explicit sexual depictions or representations, and all are comparable to material found constitutionally protected by this Court.

Insofar as the *Miller* standards are concerned, petitioner's conviction has been affirmed under a statute with a meaning quite different from the one he was charged with violating. The statute as construed is impermissibly vague as applied to petitioner because of its failure to give him fair notice that criminal liability was dependent upon the unknown specified sexual conduct, or upon some standards other than national, or upon a standard other than "utterly without redeeming social value." *Rabe v. Washington,* 405 U.S.313. The petitioner was charged and tried solely under an unworkable national standard. There never was any charge or proof in the case herein that the publications offended some local standard. It has been repeatedly held by this Court that conviction upon a charge not made, or upon a theory not tried, is a sheer denial of due process of law. *DeJonge v. Oregon,* 299 U.S.353; *Cole v. Arkansas,* 333 U.S.196.

Furthermore, the court below manifestly read into the law conduct not previously proscribed and which, in addition, altered the legal rules of evidence, permitting less and different testimony than the law required at the time of the commission of the alleged offense. See *Bouie v. Columbia,* 378 U.S.347. This Court recently stated, in *Douglas v. Buder,* 93 S.Ct. 2199, 2200-2201:

> ". . . We held in Bouie that '[w]hen . . . [an] unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the ef-

fect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime."

The action of the court below is tantamount to an amendment of the indictment herein, contrary to constitutional commands. The indictment so amended would no longer be the accusation made by the Grand Jury which returned it. *Ex Parte Bain,* 121 U.S.1, 10, 13.

**Conclusion.**

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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*Michael G. Thevis.*

SAM ROSENWEIN,
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## APPENDIX A.

### Opinion and Judgment of the Court of Appeals.

United States of America, Plaintiff-Appellee, v. Michael G. Thevis and Peachtree News Company, Inc., Defendants-Appellants. No. 71-2614.

United States Court of Appeals, Fifth Circuit. Sept. 12, 1973.

Before JOHN R. BROWN, Chief Judge, and BELL and SIMPSON, Circuit Judges.

BELL, Circuit Judge:

Appellants Thevis and Peachtree News Company, Inc. were charged in a twelve-count indictment with transporting obscene material by common carrier in interstate commerce, in violation of 18 U.S.C.A. §1462.[1] Jury trial was waived. The subject matter of each count was a particular magazine and appellants were convicted on each of the counts. The district court, 329 F.Supp. 265, found that the material in question, i.e., each magazine, was obscene under the three-pronged test of *Memoirs*.[2] A term of six months imprisonment and five years probation was imposed on Thevis under each count, with the sentences to be

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[1]18 U.S.C.A. § 1462 (1966):

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; . . .

shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense.

[2]A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 1966, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1.

served concurrently. In addition, fines were imposed on each defendant with respect to each count. This appeal followed. We affirm with respect to six counts and reverse as to six.

In urging reversal, appellants originally presented five arguments to this court. These were: (1) that the constitutional test for obscenity must focus on whether "pandering" is involved in the distribution of challenged material, and on whether the material is distributed to minors or unwilling adults, cf. Redrup v. New York, 1967, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515; (2) that the indictment was unconstitutionally vague in that it merely tracked the statutory language without specifying the elements constituting "obscenity"; (3) that it was necessary for the government to prove that the appellants had transported the magazines knowing that they were obscene in the constitutional sense; (4) that 18 U.S.C.A. § 1462 is void for overbreadth in that it reaches transportation of obscene material for private as well as commercial use; and (5) that the prosecution failed to prove by competent evidence that the magazine fell outside the protection of the *Memoirs* standard. We understand appellants' fifth assignment of error to include two distinguishable elements: first, that the prosecution failed to produce sufficient expert testimony; and second, that the evidence, of whatever nature, was insufficient to support the lower court's finding on the issue of obscenity vel non. We will treat these two elements as separate assignments of error.

Subsequent to oral argument, the Supreme Court announced five opinions in which a majority of that Court agreed on concrete guidelines to isolate materials depicting or describing "patently offensive 'hard core' sexual conduct" from expression protected by the First

Amendment. Miller v. California, 1973, .... U.S. ...., ...., 93 S.Ct. 2607, 2616, 37 L.Ed.2d 419, 432; Paris Adult Theatre I v. Slaton, 1973, .... U.S. ...., 93 S.Ct. 2628, 37 L.Ed.2d 446; United States v. Orito, 1973, .... U.S. ...., 93 S.Ct. 2674, 37 L.Ed.2d 513; Kaplan v. California, 1973, .... U.S. ...., 93 S.Ct. 2680, 37 L. Ed.2d 492; United States v. 12 200-Ft. Reels of Super 8 mm. Film, 1973, .... U.S. ...., 93 S.Ct. 2665, 37 L. Ed.2d 500.

In light of these opinions, appellant has filed a supplemental brief urging that the *Memoirs* standard can no longer be used for testing obscenity. Further, in this brief it is argued that the *Miller* standard is also inapplicable, for two reasons: (1) that application of the new standard would be violative of the Ex Post Facto Clause of Article I, § 9, United States Constitution; and (2) that in any case the material in question would be protected under *Miller* because 18 U.S.C.A. §1462, as written or authoritatively construed, does not specifically define that sexual conduct whose depiction or description is thereby regulated. In essence, appellants are contending, on the authority of *Miller*, that the Supreme Court has eliminated all obscenity laws that would have been otherwise applicable to transactions occurring prior to June 21, 1973, and that the Court has also eliminated all laws controlling obscenity after that date, save as legislatures enact or courts construe statutes to meet the *Miller* requirements. In sum, claim the appellants, we are without power to test the materials for obscenity under any standard. We reject this broad contention. We do not perceive that the Supreme Court, either deliberately or unwittingly, has stripped the nation of laws against obscenity in any such manner.

For reasons to be discussed in Part II of this opinion, we hold that the twelve magazines are to be tested for obscenity under both standards, with the appellants in every instance to receive the benefit of the most favorable standard. We reserve the issue of obscenity *vel non*, under both standards, for Part III. In Part I we shall consider appellants' first five original assignments of error.

I.

[1] Appellants' first assignment of error is that the materials in question should not be tested under a standard as restrictive of pornography[3] as *Memoirs*. Rather they urge a standard arguably suggested in Redrup v. New York, supra, requiring for a finding of obscenity that the materials be distributed to nonconsenting adults, to juveniles, or generally in a "pandering" manner. We consider this argument to have been completely foreclosed by the Supreme Court's statement, in *Miller*, that the *Memoirs* standard was correctly viewed as the limit on state prosecution prior to *Miller*, .... U.S. at ...., 93 S. Ct. at 2618, 37 L.Ed.2d at 435. We also find entirely spurious the argument that there was such a marked departure in *Redrup* from the basic assumption of *Memoirs*, that the nature of the material and not the manner of its distribution is determinative of obscenity. In the *Redrup* per curiam opinion, the Court specifically declined to consider the effect of the characteristics of the method of distributing pornographic materials. Fi-

[3] "Pornography" derives from the Greek (*porne*, harlot, and *graphos*, writing). It now means "1: a description of prostitutes or prostitution. 2: a depiction (as a writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement." Webster's New International Dictionary (Unabridged, 3d Ed., 1969). Whether or not the material in question is obscene, it is pornography. This latter term connotes no legal conclusions or consequences.

nally, we note that the origin of the "pandering" concept is Ginzburg v. United States, 1966, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, and that pandering in that case was specifically treated merely as an indicator of whether the material itself appealed to prurient interests and was utterly without redeeming social value. See *Ginzburg*, 383 U.S. at 467-476, 86 S.Ct. 942.

[2] Appellants' second argument is that the indictment, which tracked the wording of 18 U.S.C.A. § 1462, must be dismissed for failure to specify the elements of obscenity. We do not agree. The general rule, stated by this court, is that:

> "An indictment which follows the language of the statute is ordinarily sufficient unless the statute omits an essential element of the offense."

United States v. Farabee, 5 Cir., 1969, 411 F.2d 1210, 1211; Downing v. United States, 5 Cir. 1965, 348 F.2d 594, 599. See also Esperti v. United States, 5 Cir., 1969, 406 F.2d 148; Bland v. United States, 5 Cir., 1962, 299 F.2d 105. The statute here does not omit any essential element of the offense for which appellants have been convicted. The term "obscene" as used in the statute is a legal term of art, not merely a generic or descriptive term. The term has been the subject of much explication in Supreme Court opinions, and in particular has been defined in *Roth*[4] and *Memoirs*. Further, in *Roth* the Court held that the words used in 18 U.S.C.A. § 1462 are sufficiently precise to avoid the due process vice of vagueness.[5]

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[4]Roth v. United States, 1957, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

[5]The sufficiency of an indictment tracking the words of 18 U.S.C.A. § 1462 was challenged in United States v. Luros, N.D.

(This footnote is continued on next page)

[3] Appellants' third contention deals with the scienter necessary for conviction under 18 U.S.C.A. § 1462. Appellants claim that it is necessary for the government to prove not merely knowledge of the nature of the materials placed in interstate commerce, but also to prove that appellants were aware that the materials were legally obscene.

Appellants base this argument on Smith v. California, 1959, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205. In *Smith*, the Supreme Court reversed the conviction of a book store proprietor under an ordinance that imposed absolute criminal liability on any party possessing obscene matter for sale. The Court held that scienter, of some nature, was a necessary element where First Amendment Rights were concerned. However, the Court pointedly did not pass on the nature of the requisite mental element. Apparently the Court did not disturb its holding in Rosen v. United States, 1896, 161 U.S. 29, 16 S.Ct. 434, 40 L.Ed. 606, that knowledge or notice of the contents of obscene material is sufficient and that it need not be shown that the material was, in the opinion of the accused, legally obscene. A number of lower courts have followed *Rosen* in recent years: United States v. West Coast News Company, 6 Cir., 1966, 357 F.2d 855, rev'd on other grounds, Aday v. United States, 1967, 388 U.S. 447, 87 S.Ct. 2095, 18 L.Ed.2d 1309; Schindler v. United States, 9 Cir., 1953, 208 F.2d 289. See also Kahm v. United States, 5 Cir., 1962, 300 F.2d 78. We hold that the government, by proving that the appellants knew the nature of the materials they put in interstate commerce, has met its burden of proving scienter.

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Iowa, 1965, 243 F.Supp. 160, rev'd on other grounds, 8 Cir., 1968, 389 F.2d 200. That court reached a conclusion identical to ours. *Id.* at 166-167.

[4] The appellants' fourth contention is that the statute under which they have been prosecuted is overbroad because it fails to distinguish between transportation of obscene materials for private use and that for commercial distribution. This argument arises from Stanley v. Georgia, 1969, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542, which established that individuals may possess obscene materials in the privacy of their own homes; and it assumes that there is a correlative right to transport and receive such material for private use. Whatever validity, if any, this reasoning may ever have had was badly eroded by United States v. Thirty-Seven Photographs, 1971, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822, and United States v. Reidel, 1971, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813. The argument has now been absolutely foreclosed by United States v. Orito, supra. In *Orito* the Court ruled against a defendant who made precisely the same claim raised here.

[5] The first element of appellants' fifth contention is that their conviction is precluded by the government's failure to use sufficient expert testimony on the issues of prurient appeal, community standards, and redeeming social value. We held in United States v. Groner, 1973, 479 F.2d 577 (En banc), that expert testimony on the part of the prosecution is not necessary in cases where the materials themselves are available for inspection by the finder of fact. That we were correct in this opinion was made clear in Paris Adult Theatre I v. Slaton, supra, ..... U.S. at ....., 9 S.Ct. at 2634, 37 L.Ed.2d at 456. See also Kaplan v. California, supra, ..... U.S. at ....., 93 S.Ct. at 2684, 37 L.Ed.2d at 498.

## II.

We now turn to the issues raised in appellants' supplemental brief, dealing with whether *Miller* precludes testing for obscenity under any standard.

In *Miller* the Court states that the constitutional test for obscenity is whether:

"(a) [T]he average person, applying 'contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest," (citations omitted)

"(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and

"(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

In *Orito*, supra, and *12 200-Ft. Reels*, supra, the Court made clear that this standard also applies to prosecutions under federal statutes. It might be noted that *Miller* relaxes the government's burden by eliminating the *Memoirs* requirement that the material be proven "utterly without redeeming social value", and by the Court's clarification that "community standards" does not refer to a nationwide community. On the other hand, in order carefully to limit regulation of pornographic materials, so as to avoid First Amendment incursions, the *Miller* standard requires that regulatory statutes define specific sexual conduct to whose depiction or description they apply. However, the Court makes clear that the statutory requirement can be satisfied by a judicial gloss, and that statutes as broad as 18 U.S.C.A. § 1462 are subject to such construction.

See *12 200-Ft. Reels*, supra, fn. 7 (discussed and quoted at p. 13 infra).

Having thus stated the standards governing control of pornography, and having also resolved other points of uncertainty,[6] the Supreme Court in each case, and in some 60 other cases dealt with summarily or by per curiam decision on July 25, 1973, vacated the judgments and remanded for further proceedings not inconsistent with the *Miller* series of opinions.

Appellants would have us conclude that the Court's wholesale vacation and remand of obscenity cases, and especially that of Kaplan v. California, supra (in which the Court agreed that the material was obscene under the *Memoirs* standard), established that the *Memoirs* standard could not have been used as a basis for conviction in pending cases.

[6] We decline to read so much into *Miller*. Rather, we conclude that by indiscriminately vacating and remanding these cases, the Supreme Court declared that all obscenity cases which had not reached final adjudication should be reexamined in light of its clarification of previous standards and its declaration of new standards. We do not read this as precluding our application of the *Memoirs* standard to materials involved in transactions occurring in 1970. We base this conclusion on several observations. For one, we note that the Supreme Court in *Miller* stated specifically that *Memoirs* was "correctly regarded at the time of trial as limiting state prosecution under controlling case law." ..... U.S. at ....., 93 S.Ct. at 2618, 37 L.Ed. 2d at 435.

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[6]Some of the auxiliary rulings were noted above when this court dealt with various of the appellants' original arguments for reversal. See Part I of this opinion.

Further, at no point did the Court indicate that *Miller's* clarification and modification of *Memoirs* was the result of *Memoirs* permitting unconstitutional infringement on efforts to distribute pornography. Rather, the Court was dissatisfied with *Memoirs*, because it imposed greater burdens on the regulation of such materials than was demanded by the Constitution. Thus the Court criticized the "utterly without redeeming social value" requirement as being a "burden virtually impossible to discharge under our criminal standards of proof." *Miller*, ..... U.S. at ....., 93 S.Ct. at 2613, 37 L.Ed.2d at 429, and it stated that "it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City". *Id.*, at ...., 93 S.Ct. at 2619, 37 L.Ed.2d at 435. We are unable to conclude from the Court's wholesale remand of these cases, without more, that the Court, concerned as it was for strengthening the power to regulate pornography, chose gratuitously to eliminate constitutionally-valid law that would otherwise be available in prosecuting pending obscenity cases.

However, we do believe it to be our duty, under the *Miller* remands and in view of the care with which the judiciary must protect First Amendment rights, to assure that no one is convicted under earlier extant standards if they are more restrictive of pornography than those in *Miller*. Thus when we make, as we are required to do, an "independent constitutional judgment on the facts of the case as to whether the material is constitutionally protected", Jacobellis v. Ohio, 1964, 378 U.S. 184, 190, 84 S.Ct. 1676, 12 L.Ed.2d 793; United States v. Groner, 5 Cir., 1973, supra, we

shall consider both the *Miller* and *Memoirs* definitions of obscenity. Any count based on a magazine which is not obscene under both of these standards is due to be dismissed.

Our dual test approach is out of an abundance of caution based on the surmise that the Supreme Court, by vacating and remanding the entire group of obscenity cases, indicated that defendants in pending prosecutions were entitled to the benefit, if any, of the new standards. That our decision in this case must so accommodate the new standard is made evident by Miller v. United States, 1973, ..... U.S. ....., 93 S.Ct. 3030, 37 L.Ed.2d 1022. There the Court vacated and remanded a federal conviction for reconsideration in light of the *Miller* series of opinions. The federal conviction was under the *Memoirs* standard and the very statute here involved, and against a defendant who raised on appeal contentions similar to those made by the appellants here. See Miller v. United States, 9 Cir., 1970, 431 F.2d 655.

[7] Therefore, before we consider the question of obscenity *vel non*, and because we do apply the *Miller* standard, we must address ourselves to the question whether 18 U.S.C.A. § 1462 can satisfy the *Miller* requirement that the applicable statute specifically define sexual conduct whose depiction or description is thereby restricted. This assumes, of course, that the Supreme Court intended for appellants to have the benefit of the *Miller* standard.[7]

The statute under which the appellants were indicted proscribes interstate transportation of "obscene, lewd,

[7]We do not assume, given ex post facto considerations, that the Supreme Court intended to impose any detriment ensuing from the *Miller* standards on appellants.

lascivious, or filthy" materials. On its face, this statutory terminology does not contain the specifics required by *Miller*. The same, of course, might have been said of the statute while *Memoirs* controlled the definition of obscenity. The difference is that *Miller* requires that elements of the definition be a part of the statute. This requirement may be met, however, according to *Miller*, by authoritative judicial construction. Further, in *12 200-Ft. Reels*, supra, at fn. 7, the Court states that it is "prepared to construe such [federal statutory] terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hardcore' sexual conduct given as examples in *Miller*. . . ."[8] We believe that this answers the question and that the definition of *Miller* is a gloss properly added to § 1462. The effect is to substitute the *Miller* definition of "obscene" for the *Memoirs* definition. On this basis we proceed to an examination of the materials which underlie the indictment.

III.

In making our independent constitutional judgment under Jacobellis v. Ohio, supra, as to whether the materials in question are constitutionally protected, we have inspected the magazines in question and have applied both the *Memoirs* and *Miller* standards. Our conclusions on each element of both tests as to each magazine are contained in Table I.

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[8]These examples are:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, execretary functions, and lewd exhibitions of the genitals." *Miller*, .... U.S. at ...., 93 S.Ct. at 2615, 37 L.Ed.2d at 431.

TABLE I

| | *Memoirs* | | | *Miller* | | |
|---|---|---|---|---|---|---|
| | *(a)* | *(b)* | *(c)* | *(a)* | *(b)* | *(c)* |
| *Magazine Titles* | *Dominant theme, taken as a whole, appeals to a prurient interest in sex* | *Patently offensive because it affronts contemporary community standards relating to description or representation of sexual matters* | *Utterly without redeeming social value* | *The average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest* | *Patently offensive depiction or description of sexual conduct specifically defined by applicable statute* | *Taken as a whole, lacks serious literary, artistic, political or scientific value* |
| Boys and Their Male Lovers | Yes | Yes | No | Yes | Yes | Yes |
| Duo | Yes | Yes | Yes | Yes | Yes | Yes |
| Domino | Yes | Yes | Yes | Yes | Yes | Yes |
| Love Knot | Yes | Yes | Yes | Yes | Yes | Yes |
| Wanton | Yes | Yes | Yes | Yes | Yes | Yes |
| My Boys | Yes | Yes | Yes | Yes | Yes | Yes |
| In & Its Nice | Yes | Yes | Yes | Yes | Yes | Yes |
| Girlfriends | Yes | Yes | No | Yes | Yes | Yes |
| Pussy Willow | Yes | Yes | No | Yes | Yes | Yes |
| Arcadia | Yes | Yes | No | Yes | Yes | Yes |
| Teenage Jaybirds | Yes | Yes | No | Yes | Yes | Yes |
| Cloud 9 | Yes | Yes | No | Yes | Yes | Yes |

[8] In summary, we have concluded that all of the magazines are obscene under *Miller*, but that six are protected by *Memoirs* requirement that they be utterly without redeeming social value. We have distinguished these six from the remainder on the basis of their significant content of literary matter, including short stories of at least arguable merit as well as discussions of lesbianism, homosexuality, nudity, censorship, photography, marital sexual problems, and the nude in fine art. The inclusion of this literary matter in significant proportions precludes a finding, in our judgment, that the six magazines are "utterly without redeeming social value." The issue as to these six is close, due to the numerous pornographic pictures included with the literary matter. Indeed, the pictures in each instance are the principle content of the magazines and would, standing alone, be found obscene.

Since we have ruled that appellants are to receive any protection provided by either applicable standard, their convictions on the six counts based on magazines we find to be protected by *Memoirs* must be reversed. The judgment of conviction as to the other six counts is affirmed.

Affirmed in part; reversed in part.

## APPENDIX B.

### Opinion and Order of District Court.

United States of America v. Michael G. Thevis and Peachtree News Company, Inc. No. 70-72-Cr-J.

United States District Court, M. D. Florida, Jacksonville Division. June 25, 1971.

### MEMORANDUM OPINION AND ORDER

FISHER, District Judge.

The Defendants, Michael G. Thevis and Peachtree News Company, Inc., entered a plea of not guilty to a twelve-count indictment charging them with violations of a Federal Obscenity Statute, to wit, Title 18, U.S.C., Section 1462.[1] Count One of the indictment charges, "* * * that the Defendants, Michael G. Thevis and Peachtree News Company, Inc., did wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 38 copies of magazines entitled "Duo," from Atlanta, State of Georgia, to Springfield News Company, Jacksonville, Florida." The remaining eleven counts of the indictment are identical to Count One with the exception of the alleged obscene material, to wit, Count Two, 10 copies of magazines entitled "Boys and Their Male

[1] "Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character * * *" shall be guilty of an offense against the laws of the United States.

Lovers;" Count Three, 20 copies of magazines entitled "Domino;" Count Four, 5 copies of magazines entitled "Love Knot;" Count Five, 5 copies of magazines entitled "Wanton;" Count Six, 110 copies of magazines entitled "My Boys;" Count Seven, 5 copies of magazines entitled "In and Its Nice;" Count Eight, 6 copies of magazines entitled "The Girlfriends;" Count Nine, 10 copies of magazines entitled "Pussy Willow;" Count Ten, 10 copies of magazines entitled "Arcadia;" Count Eleven, 10 copies of magazines entitled "Teenage Jaybird;" and Count Twelve, 10 copies of magazines entitled "Cloud 9."

The offenses described in Counts One through Seven are alleged to have occurred April 24, 1970, and the offenses described in Counts Eight through Twelve are alleged to have occurred May 6, 1970.

Pre-trial motions challenging the sufficiency of the indictment and requesting a stay of proceedings were denied by the trial court and the Supreme Court. The Government and the Defendants executed and filed Waivers of a Jury Trial and entered into Stipulations of Fact, and the case proceeded to trial by the Court sitting without a jury. After the conclusion of the evidence, oral arguments were heard and the Court took the case under advisement, allowing counsel for the Government and the Defendants to file written briefs.

Although the Defendants entered a plea of not guilty to each of the twelve counts of the indictment, insisting that the Government meet its burden of proof in adducing evidence beyond a reasonable doubt to each and every element of the alleged offense, no serious contest was made of the fact that the material was transported in interstate commerce on or about the dates al-

leged in the indictment and that both of the Defendants, Michael G. Thevis and Peachtree News Company, Inc., had knowledge of the contents of the magazines and knowledge of the interstate shipment.

The Defendants contend that the publications contain primarily pictures of either males with males, or females with females, or males with females at the most engaged in simulated activity involving primarily psuedo foreplay. Therefore, their argument continues, said magazines cannot be considered obscene in the constitutional sense and are entitled to First Amendment protection absent the actual depiction of sexual acts where no imagination is required to see the act in progress, such as that which shows insertion or genital travel in the actual act of intercourse or sodomy, or actual acts of cunnilingus or fellatio, in other words, "hard-core pornography;" Defendants further contend that if in fact, there is any redeeming social value in the materials, they may not be proscribed; and further, if the materials are disseminated to willing adults in an adults-only environment and are not disseminated to juveniles or pandered or foisted upon an individual wishing to avoid confrontation with them, the materials may not be proscribed.

The Government, on the other hand, contends that the publications in question contain either males with males, or females with females, or males with females depicting simulated acts of intercourse or other sexual acts in such a manner as to be held obscene under the basic test first pronounced in Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), and later elaborated upon by A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v.

Massachusetts, 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1 (1966), where the Supreme Court stated the requirements to be as follows:

> " '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' * * * Under this definition as elaborated in subsequent cases, three elements must coalesce: It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

The issue for the Court to determine is whether or not the material in the magazines in question is obscene. In this regard, there is absolutely no possibility for doubt that the material in the twelve types of magazines depicts pornography in its gross, most vulgar and offensive form, but, for the Defendants to be found guilty of the offenses alleged in the indictment, the Court must find the magazines to be obscene in a constitutional sense, and therefore not entitled to First Amendment protection.

Our task has been made considerably easier by the Supreme Court's recent opinions in United States v. Reidel, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971) and United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971). In *Reidel,* the Court declared that the First Amendment is not violated by the application of

Section 1461 of Title 18, U.S.C., which forbids the use of the mails to deliver obscene matter, to the distribution of obscene material to willing recipients who state that they are adults. Likewise, in *Thirty-Seven Photographs*, the Court held that the First Amendment is not violated by the application of Title 19, U.S.C., Section 1305(a), which authorizes the Government to seize at the port of entry into the United States obscene matter privately possessed by a person who intends it for commercial distribution.

In the years between *Roth* in 1957 and *Reidel* and *Thirty-Seven Photographs* in 1971, certain Supreme Court decisions seemed to narrow the permissible scope of regulation of allegedly obscene material. See Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964); Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966); Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967); Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). Under these decisions and others, Carlos v. New York, 396 U.S. 119, 90 S.Ct. 395, 24 L.Ed.2d 303 (1969); Cain v. Kentucky, 397 U.S. 319, 90 S.Ct. 1110, 25 L.Ed.2d 335 (1970); Bloss v. Dykema, 398 U.S. 278, 90 S.Ct. 1727, 26 L. Ed.2d 230 (1970); Walker v. Ohio, 398 U.S. 434, 90 S.Ct. 1884, 26 L.Ed.2d 385 (1970); Hoyt v. Minnesota, 399 U.S. 524, 90 S.Ct. 2241, 26 L.Ed.2d 782 (1970); Bloss v. Michigan, 402 U.S. 938, 91 S.Ct. 1615, 29 L.Ed.2d 106 (1971),[2] it would appear that a new doctrine of First Amendment protection had evolved, and it would not be accurate to state cate-

[2]These are all cases involving state convictions reversed per curiam without opinions citing *Redrup*.

gorically that the First Amendment did not protect obscenity.

In *Jacobellis*, the Court reversed a conviction under a state statute for the exhibition of an obscene motion picture. The Court reiterated the standard that a work cannot be proscribed unless it is "utterly without redeeming social importance," and hence material that deals with sex in a manner that advocates ideas, or that has literary or scientific or artistic value or any other form of social importance, may not be held obscene and denied constitutional protection.

In *Ginzburg*, defendant was convicted of violating the federal obscenity statute by mailing three publications that dealt exclusively with sex. Besides testimony as to the merit of the material, abundant evidence was introduced that each of the publications was originated or sold as stock in trade of the business of pandering, i.e., the purveying of publications openly advertised to appeal to the customers' erotic interest. The Supreme Court affirmed the conviction, holding that the defendant had deliberately represented the publications as erotically arousing and had commercially exploited them as erotica solely for the sake of prurient appeal. In other words, the gravamen of the offense was "pandering."

In *Redrup*, the Court handed down a decision in which it found specific books and magazines not "obscene in the constitutional sense" under the three criteria stated in *Roth* and *Memoirs*. The real significance of the opinion, however, is the Court's dictum that certain publications are not protected by the First Amendment. The Court went on to say that if objectionable material is "pandered," "obtrusively" adver-

tised, or placed in an environment in which it is likely to fall into the hands of children, it can be constitutionally suppressed.

Subsequent to *Redrup*, the Supreme Court considered the issue of obscenity from a somewhat different viewpoint in Stanley v. Georgia. There, pornographic films were found in Stanley's home, and he was convicted under Georgia statutes for possessing obscene material. The Court concluded that the state has no legitimate interest in controlling what an adult reads in the privacy of his home and that the mere private possession of obscene matter cannot constitutionally be made a crime. But the Court neither overruled nor disturbed the holding in *Roth*, using the following language in *Stanley* at page 568, 89 S.Ct. at page 1749:

> "*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home * * *"

Since *Stanley*, a few of the lower courts have construed the decision narrowly but apparently correctly, holding that an individual only has a right to possess obscene material in the privacy of his home. United States v. Melvin, 419 F.2d 136 (4th Cir. 1969); United States v. Fragus, 422 F.2d 1244 (5th Cir. 1970), supplementing its earlier opinion June 23, 1970 (No. 27801); Gable v. Jenkins, 309 F.Supp. 998 (N.D. Ga. 1969) (three-judge court), aff'd 397 U.S. 592, 90 S.Ct. 1351, 25 L.Ed.2d 595 (1970). However, a considerable number of the lower courts have given Stanley a broader interpretation, holding that if the

Government has no interest in preventing a citizen from reading books and watching films in the privacy of his home, then it can have no interest in preventing him from acquiring obscene material. United States v. B & H Dist. Corp., 319 F.Supp. 1231 (W.D.Wis. 1970), vacated and remanded, 403 U.S. 927, 91 S.Ct. 2248, 29 L.Ed.2d 705 (1971); United States v. Orito, No. 70-CR-20 (E.D.Wis. Oct. 28, 1970), appeal docketed 39 U.S.L.W. 3333 (No. 1276 Jan. 26, 1971); Stein v. Batchelor, 300 F.Supp. 602 (N.D.Tex. 1969), vacated and remanded on proced. grds. sub nom. Dyson v. Stein, 401 U.S. 200, 91 S.Ct. 769, 27 L.Ed.2d 781 (1971); Karalexis v. Byrne, 306 F.Supp. 1363 (D. Mass. (1969), vacated and remanded on proced. grds. 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971); United States v. Lethe, 312 F.Supp. 421 (E.D.Cal. 1970); Childs v. Oregon,[3] 300 F.Supp. 649 (D.C. 1969), rev'd 431 F.2d 272 (9th Cir. 1970), rev'd 401 U.S. 1006, 91 S.Ct. 1248, 28 L.Ed.2d 542 (1971); United States v. 35 M.M. Motion Picture Film,[4] 312 F.Supp. 1382 (S.D.N.Y.), rev'd 432 F.2d 705 (2nd

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[3]In *Childs*, the lower court found the material not obscene and not so obtrusive as to force it upon an unwilling individual. The Appellate Court reversed this decision and found the material obscene. This decision was reversed by the Supreme Court on the basis of *Redrup*.

[4]In *35 M.M. Motion Picture Film*, the lower court found the material obscene and an offensive affront to community standards. The Appellate Court reversed the decision and found the material not obscene. However, the higher court did state that its holding was based on adult standards and that it was possible that a prosecution might succeed under a statute showing concern for juveniles. The Government's Motion to Dismiss based on *Thirty-Seven Photographs* was granted.

Cir. 1970), writ dismissed on other grds. United States v. Unicorn Enterprises, Inc., 403 U.S. 925, 91 S.Ct. 2241, 29 L.Ed.2d 704 (June 15, 1971); United States v. Reidel, Crim. No. 5845 (C.D.Cal. 1970) (three-judge court).

As best we can read the obscenity decisions, the Supreme Court has never specifically held, the nearest thing being the dictum in *Redrup,* that obscene material may receive First Amendment protection unless such material is disseminated to unconsenting adults and children or is pandered. On the other hand, many of the lower courts have specifically held that before objectionable material can be constitutionally suppressed, it must be pandered, obtrusively disseminated, or placed in an environment in which it is likely to fall into the hands of children. Poulos v. Rucker, 288 F.Supp. 305 (N.D.Ala. 1968); United States v. 77 Cartons of Magazines, 300 F.Supp. 851 (N.D.Cal. 1969); United States v. Barnaov, 293 F.Supp. 610 (D.C.) rev'd 418 F.2d 1051 (9th Cir. 1969); Childs v. Oregon, *supra*; United States v. 35 M.M. Motion Picture Film, *supra*; United States v. Thirty-Seven (37) Photographs, 309 F.Supp. 36 (C.D.Cal. 1970) (three-judge court); United States v. Reidel, *supra.* However, there is one recent Ninth Circuit Court of Appeals case, Miller v. United States, 431 F.2d 655 (1970), which not only held the distribution of the obscene material to be "pandering," but also held that the indiscriminate and wholesale distribution of the obscene material with reckless disregard of the identity and age

of the recipient was a violation of Title 18, U.S.C., Sections 1461 and 1462.

Since the evidence in our case does not involve obtrusive dissemination or an environment in which the material is likely to fall into the hands of juveniles, and the magazines in question were not pandered, in following the decisions based on *Redrup*, we might be expected to find the Defendants not constitutionally guilty of interstate transportation of obscene material. But *Reidel* and *Thirty-Seven (37) Photographs* have now clarified beyond question that obscene material regardless of how or to whom disseminated is not within the scope of First Amendment protection. *Roth* has been reaffirmed with all of its original vitality. In *Reidel*, Justice White said: "*Roth* has not been overruled. It remains the law in this Court and governs this case." Similarly, in *Thirty-Seven (37) Photographs*, he said: "As we held in Roth v. United States * * * obscenity is not within the scope of first amendment protection." Further, in discussing the District Court opinion in *Reidel*, and the application of the *Stanley* decision, Justice White observed:

> "The District Court ignored both *Roth* and the express limitations on the reach of the *Stanley* decision. Relying on the statement in *Stanley* that 'the Constitution protects the right to receive information and ideas * * * regardless of their social worth,' 394 U.S., at 564, 89 S.Ct. at 1247, the trial judge reasoned that 'if a person has the right to receive and possess this material, then someone

must have the right to deliver it to him.' He concluded that Sec. 1461 could not be validly applied 'where obscene material is not directed at children, or it is not directed at an unwilling public, where the material such as in this case is solicited by adults. * * *'

"The District Court gave *Stanley* too wide a sweep. To extrapolate from Stanley's right to have and peruse obscene material in the privacy of his own home a First Amendment right in Reidel to sell it to him would effectively scuttle *Roth,* the precise result that the *Stanley* opinion abjured. Whatever the scope of the 'right to receive' referred to in *Stanley,* it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here—dealings which *Roth* held unprotected by the First Amendment."

*Reidel,* at 4 and 5.

We can now say for certain that obscenity need not involve the three enumerated areas, i.e., "pandering" or "dissemination to unconsenting adults or children," in order for it to be proscribed and constitutionally suppressed. Therefore, under the facts of our case, we find that the magazines in question are obscene and that the Defendants are not protected by the First Amendment. The evidence adduced clearly proves beyond a reasonable doubt that the male and female homosexual material appeals to the prurient interest in sex of these clearly defined deviant groups; further, that the female with male publications appeal to a prurient interest in sex of an average person of the community. Second,

the Court finds that the magazines involved in each of the twelve counts are patently offensive because they offend beyond a reasonable doubt contemporary community standards as well as national standards relative to sexual matters; third, the Court finds beyond a reasonable doubt that said magazines named in each of the twelve counts are utterly without redeeming social value; and finally, the Court finds beyond a reasonable doubt that the Defendants wilfully and knowingly caused the magazines described in each of the twelve counts to be transported in interstate commerce by common carriers.

Therefore, it is ordered and adjudged that the Defendants, Michael G. Thevis and Peachtree News Company, Inc., are guilty of the charges contained in each of the twelve counts of the indictment, and each of the Defendants is instructed to appear before the Court for the purpose of being sentenced.

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## APPENDIX C.

### Order of Court of Appeals Denying Petitions for Rehearing.

In the United States Court of Appeals for the Fifth Circuit.

United States of America, Plaintiff-Appellee, versus Michael G. Thevis and Peachtree News Company, Inc., Defendants-Appellants. No. 71-2614.

*Appeal from the United States District Court for the Middle District of Florida.*

On Petitions for Rehearing and Petitions for Rehearing En Banc. (Opinion Sept. 12, 1973, 5 Cir., 1973, ..... F.2d .....).

(November 15, 1973)

Before BROWN, Chief Judge, BELL and SIMPSON, Circuit Judges.

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure: Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

## APPENDIX D.

### Constitutional and Statutory Provisions.

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

2. The pertinent provisions of the Fifth Amendment are:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

3. The pertinent provisions of the Sixth Amendment are:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ."

4. The pertinent provisions of Article I, §9 are:

"* * * No . . . ex post facto Law shall be passed. * * *"

5. The pertinent provisions of 18 U.S.C. §1462 are:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) an obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or * * *

"Whoever knowingly takes from such express company or other common carrier any matter or

thing the carriage of which is herein made unlawful—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter." (June 25, 1948, c. 645, 62 Stat. 768; May 27, 1950, c. 214, §1, 64 Stat. 194; Aug. 28, 1958, Pub.L. 85-796, §2, 72 Stat. 962.)

## APPENDIX E.

### Opinion of the Court of Appeals for the Ninth Circuit (Henson).

United States Court of Appeals, for the Ninth Circuit.

United States of America, Appellee, v. Thomas Venest Henson aka Tom Vinnie Henson, George Victor Abisalih aka George Abbey, dba "Associated Theaters of Texas", Appellants. No. 73-2063.

Filed: Oct. 5, 1973.

Appeal from the United States District Court for the Central District of California.

Before: ELY and GOODWIN, Circuit Judges, and MURRAY, District Judge.*

PER CURIAM:

In an indictment consisting of two counts and filed on January 10, 1973, the appellants were charged with having transported obscene material in interstate commerce, a violation of 18 U.S.C. § 1462. Their trial before a jury commenced on March 13, 1973, and was concluded on April 2, 1973, when the jury returned verdicts of guilty as to each appellant on both counts of the indictment. In instructing the jury in respect to the question of obscenity, the trial judge generally and properly enunciated the tests as they were to be found in controlling Supreme Court authorities existing at the time, principally, *Roth v. United States*, 354 U.S. 476 (1957), and *Memoirs v. Massachusetts*, 383

*Honorable William D. Murray, Senior United States District Judge, Butte, Montana, sitting by designation.

U.S. 413 (1966). Thereafter, on June 21, 1973, and after the entry of the judgments of conviction here challenged, the Supreme Court issued a series of opinions in which its prior definitions of obscenity were in part repudiated and in which some elements of the previously existing tests applied by the District Court in this case were generally characterized as vague, ambiguous, or essentially meaningless.

In the light of the Supreme Court's decisions of June 21, 1973, hereinafter cited, the judgments of conviction must be, and they hereby are, vacated. The cause is remanded to the District Court for reconsideration in the light of *Miller v. California*, .... U.S. ...., 41 U.S.L.W. 4925 (June 21, 1973); *Paris Adult Theatres I v. Slaton*, .... U.S. ...., 41 U.S.L.W. 4935 (June 21, 1973); *United States v. Orito*, .... U.S. ...., 41 U.S.L.W. 4956 (June 21, 1973); *Kaplan v. State of California*, .... U.S. ...., 41 U.S.L.W. 4958 (June 21, 1973); *United States v. 12 200-Ft. Reels of Super 8 mm Film*, .... U.S. ...., 41 U.S.L.W. 4961 (June 21, 1973). *See Stroud v. State*, .... Ind. ...., 300 N.E. 2d 100 (Aug. 21, 1973); *Mohney v. State*, .... Ind. ...., 300 N.E. 2d 66 (Aug. 21, 1973).

SO ORDERED.

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United States Circuit Judges

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United States District Judge

## APPENDIX F.

### Opinion of the Court of Appeals for the Tenth Circuit (Friedman).

United States of America, Appellee, v. Melvin Friedman and Peachtree National Distributors, Inc., Appellants.

United States Court of Appeals, Tenth Circuit.

Filed: December 11, 1973.

Nos. 72-1143-44—November 1973 Term.

Appeal From the United States District Court for the Western District of Oklahoma (D.C. # CR-71-223). Robert Eugene Smith, Atlanta, Georgia (Gilbert H. Deitch, Chattanooga, Tennessee, Don Manners, William R. Cathcart, and Jim Merz, of Counsel Oklahoma City, Oklahoma, with him on the Brief), for Appellants.

William R. Burkett, United States Attorney, for Appellee.

Before LEWIS, Chief Judge, SETH and McWILLIAMS, Circuit Judges.

PER CURIAM.

Melvin Friedman and Peachtree National Distributors, Inc. appeal from their convictions and sentences for violation of 18 U.S.C. § 1465(2) after a trial to a jury in the United States District Court for the Western District of Oklahoma.

It is our view that the several recent decisions of the Supreme Court require a reconsideration of the standards applicable to cases of this nature. *See* Miller v. California, .... U.S. .... (1973), 41 U.S.L.W. 4925

(June 21, 1973); United States v. Orito, .... U.S. .... (1973), 41 U.S.L.W. 4956 (June 21, 1973); United States v. 12 200-Ft. Reels of Super 8 mm. Film, .... U.S. .... (1973), 41 U.S.L.W. 4961 (June 21, 1973).

These decisions, in our opinion, require a reexamination of the facts of this case together with the determination of what may be the applicable standards. We are not unmindful of the decisions of other circuits which hold that remand is not necessary. We are not prepared to hold or assume that in all instances the national standards are more lenient than all local standards. Further there are substantial unresolved questions as to the nature of the proof now required.

The decisions cited above include cases arising under state law and under federal law. The Court did not express itself directly on the application of "community standards" to trials under the federal statute as compared to its statement as to the state laws in Miller. *See*, however, United States v. 12 200-Ft. Reels, Slip Opinion at 7, and the reference therein to "these" standards. 12 200-Ft. Reels upheld an attack on the constitutionality of 19 U.S.C. § 1350(a), and the Court related the tests under that section to the examples in Miller. In United States v. One Reel of Film, 481 F.2d 206, the First Circuit considered a post-Miller forfeiture case also under 19 U.S.C. § 1305 as to a film seized upon entry into the country. The court there applied national standards to the seizure apparently for the very practical reasons expressed in the concurring opinion.

A consideration of the application of national or local standards should be initially made by the trial court in addition to the determination of what such standards may be. *See also* United States v. Ewing, ....

F.2d .... (Tenth Circuit, No. 638-70), opinion after remand to this court.

Although it is clear that venue in this case was properly laid in the Western District of Oklahoma, 18 U.S.C. §§ 1465, 3237(a); *see* Swisher v. Moseley, 442 F.2d 1331 (10th Cir.); United States v. Luros, 243 F. Supp. 160 (N.D.Iowa), *rev'd on substantive grounds, sub nom.* Luros v. United States. 389 F.2d 200 (8th Cir.); *cf.* Gold v. United States, 378 F.2d 588 (9th Cir.); United States v. Ross, 205 F.2d 619 (10th Cir.), we query why the case was brought in that district as opposed to another. Considerations of *forum non conveniens* and the interests of justice, *see* Fed.R.Crim.P. 21(b), and the principles enunciated in United States v. Luros, 243 F.Supp. 160 (N.D.Iowa), would appear to be applicable to such cases as this where a national distributor of "literature" distributes its material throughout the nation. *See* Jones v. Gasch, 404 F.2d 1231 (D.C.Cir.) (opinion and dissent). We of course express no view on this matter but merely raise the question. It is apparent that this problem will be of increasing importance in cases of this nature in the future.

Accordingly, the judgments of conviction are hereby vacated and the cause is remanded to the district court for a new trial.

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